No. A-318 82-741

Office - Supreme Court, U.S.
FILED
OCT 29 1982
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,
Petitioner,

VS.

WILLIAM A. LUBBERS, GENERAL COUNSEL OF THE NATIONAL LABOR RELATIONS BOARD, JAMES S. SCOTT, REGIONAL DIRECTOR, REGION 32 OF THE NATIONAL LABOR RELATIONS BOARD, JOHN H. FANNING, CHAIRMAN, AND MEMBERS HOWARD JENKINS, JOHN A. PENNELLO AND JOHN C. TRUESDALE, INDIVIDUALLY AND AS CHAIRMAN AND MEMBERS OF THE NLRB, NORTON J. COME, DEAN H. FRANCIS AND BETTY J. MURPHY, INDIVIDUALLY,
Respondents,
and
LOCKHEED MISSILES & SPACE CO., INC.,
Intervenor.

Petition For Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTIONS PRESENTED

1. Whether the Federal District Court possessed jurisdiction to review the General Counsel's alleged abuse of his statutory discretion under the facts alleged in the complaint.

2. Whether the General Counsel's decision to withdraw and dismiss the International's ULP complaint is presumptively reviewable.

3. Whether the General Counsel's withdrawal and dismissal of the International's ULP complaint without hearing exceeded the statutory purview of his discretion.

4. Whether the "policy considerations" of reviewability militate in favor of judicial review of the General Counsel's decision pursuant to the provisions of the Administrative Procedure Act.

5. Whether dismissal of the International's Complaint pursuant to FRCP 12(b)(1) contravenes the policies and statutory intendments of notice pleading under FRCP 8 and constitutes a denial of due process.

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LOCKHEED MISSILES & SPACE CO., INC.,
Intervenor.

Petition For Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petitioner International Association of Machinists and Aerospace Workers, AFL-CIO (International), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on July 13, 1982. A continuance to file this Petition for Writ of Certiorari was granted by Justice Rehnquist on October 1, 1982, extending the time for filing to October 29, 1982.

OPINIONS BELOW

The opinion of the Court of Appeals entered on July 13, 1982 (582 F.2d 598) is attached hereto as Appendix A. The Court of Appeals decision affirmed the prior Order of the District Court for the Northern District of California, dated June 13, 1980, dismissing Petitioner's Complaint for lack of subject matter jurisdiction, a copy of which decision is attached hereto as Appendix B.

JURISDICTION

This Court's jurisdiction is invoked under Title 28 United States Code, Section 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions that are primarily involved with this disposition of this matter are set forth in Appendix C.

STATEMENT OF THE CASE

This case is before the Court on the decision of the Ninth Circuit Court of Appeals entered on July 15, 1982, sustaining the Order of the United States District Court for the Northern District of California which dismissed an action previously filed by the International on December 18, 1979, for lack of subject matter jurisdiction. Appendices A, B.

Petitioner's Complaint sought declaratory and injunctive relief against the General Counsel of the National Labor Relations Board (NLRB), *et al.*, for the purpose of securing a judicial review of the General Counsel's final order

of October 19, 1979, to withdraw and dismiss that unfair labor practices complaint (ULP) issued in the matter of the "International Association of Machinists and Aerospace Workers, AFL-CIO and Lockheed Missiles and Space Company," 32-CA-371 (filed 12/5/77).[1] The Complaint asserted jurisdiction under the Labor Management Relations Act, 1947, as amended, (LMRA), 29 USC §§ 151, *et seq.;* the Administrative Procedure Act, (APA), 5 USC §§ 701, *et seq.;* the provisions of 28 USC §§ 1337, 1361, 1391 and 2201, and, the Fifth Amendment of the United States Constitution (CR-1:1).

The gravamen of Petitioner's Complaint was that Respondent General Counsel abused his discretion in ordering the withdrawal and dismissal of the referenced ULP complaint, which action was in contravention of and "departed without explanation or reason from NLRB's prior precedent and decisional law in *United Steelworkers Union and Lynchburg Foundry Co.*, 192 NLRB 773 (1971)." Par. 21, *Complaint* (12/18/79) (CR-1:6-7).

The original ULP charge filed by Petitioner in NLRB Case No. 32-CA-371 asserted that Intervenor Lockheed Missiles and Space Co. (LMSC), had violated LMRA Sections 8(a)(1)(5) by withdrawing from multi-unit corporate-wide bargaining between the Lockheed Aircraft Corporation (LAC), on behalf of its subsidiary companies, including LMSC, and the International, on behalf of its affiliated lodges, including District Lodge 508, and subsequently unilaterally securing an agreement with District Lodge 508. Pars. 10-14, Complaint (12/18/79) (CR-1:4-5). After investigation, the Regional Director issued a complaint and

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[1]A discussion of the conflicting claims between the parties is contained in the opinion of the Court of Appeals in the case of *Benda, et al. v. Grand Lodge of the International Association of Machinists & Aerospace Workers*, reported at 584 F.2d 308 (1978) affirming the opinion of the District Court for the Northern District of California entered on December 15, 1977, and reported at 442 F. Supp. 431 (N.D. Cal. 1978).

notice of hearing on February 8, 1978, with further processing of the complaint thereafter deferred by direction of the NLRB General Counsel on April 7, 1978 (CR-1:5).

Notwithstanding the fact that LMSC's actions were deemed sufficient to bottom the issuance of a ULP complaint by Region 32, on August 17, 1979, at the direction of the NLRB General Counsel, the Regional Director issued an order withdrawing its ULP complaint and dismissing the charges, without hearing, on the basis that LMSC had not unlawfully refused to bargain because of its good faith belief that the International had engaged in bad faith bargaining in violation of Section 8(b)(3) by insisting upon a pooled ratification of all LAC contract proposals. An appeal to the Office of the General Counsel was denied, (CR-1:6).

The Complaint in the instant case was filed by the International on December 18, 1979 and alleged that the General Counsel and his agents and representatives, in withdrawing the unfair labor practice complaint without adjudication, had departed without explanation or reason from prior Board precedents and decisional law, approving a union's insistence upon pooled ratification procedures. See: *United Steelworkers and Lynchburg Foundry Co.*, 192 NLRB 773 (1971).The International's Complaint also asserted that the NLRB action was arbitrary, capricious, and not in accordance with law; that the action of the General Counsel was in excess of his statutory authority and denied the International due process of law; and, that the International would suffer irreparable damage and had no adequate remedy at law other than the United States District Court action through which it sought review of the action of the NLRB General Counsel and his agents and representatives (CR-1:6-8).

THE CIRCUIT COURT'S DECISION

In affirming the District Court's dismissal of the International's Complaint for lack of subject matter jurisdiction, the Circuit Court found that the International's "assault on the nonreviewability of the General Counsel's prosecutorial

decisions is foreclosed by a clear line of contrary authority" (no citations). Pg. A-3, *Circuit Opinion*, Appendix. The Circuit Court further found, without discussion, that "when no settlement of a complaint is at issue, the decision to withdraw the charge is non-reviewable," citing the Fourth Circuit's decision in *George Banta Co. v. NLRB*, 626 F.2d 354 (4th Cir. 1980). Pg. A-11, *Opinion*, Appendix.

Addressing this Court's decision in *Leedom v. Kyne*, 358 U.S. 184 (1958), the Circuit Court found that *Leedom* vested the federal courts with a narrow jurisdiction "to strike down an order of the Board made in excess of its delegated powers and contrary to a specific prohibition in the Act," to which the Fifth and Ninth Circuits have engrafted additional jurisdictional exceptions where the "Board's actions . . . violate constitutional rights" [*Bova v. Pipefitters & Plumbers Local 60*, 554 F.2d 226, 228-229 (5th Cir. 1977)], or where the agency's actions are "wholly without basis in law" [*NLRB v. IBEW, Local 357*, 445 F.2d 1015, 1016 n. 2 (9th Cir. Cal. 1971)]. Pg. A-8-9, *Opinion*, Appendix.

Upon its view of the facts, the Circuit Court found that the International's Complaint failed to qualify under any of the three categories. The Court found no violation of the LMRA or violation of the International's constitutional rights. And, lastly, the fact that the General Counsel chose not to abide by the case precedent of *United Steelworkers and Lynchburg Foundry*, 192 NLRB 773 (1971) did not deny his decision a basis at law since the International "never presented the NLRB with any legitimate objectives to be achieved by pooled ratification." Pg. A-10, *Opinion*, Appendix.

REASONS FOR GRANTING THE WRIT

The Court of Appeal's opinion reflects a division and conflict between the circuits concerning judicial review of the decisions of the General Counsel pursuant to the Administrative Procedure Act (APA), 5 U.S.C. §§ 500, *et seq.*, while at the same time abrogating the decisional authority of *Leedom v. Kyne*, 79 S.Ct. 180, 359 U.S. 184, 3

L.Ed.2d 210 (1958), vesting the federal courts with subject matter jurisdiction to review allegations of abuse of discretion by the General Counsel in the exercise of his powers under the LMRA. And, further, by sustaining the dismissal of the within Complaint for lack of subject matter jurisdiction pursuant to the provisions of FRCP 12(b)(1), the Court of Appeal's opinion abrogated the decisional authority of *Jenkins v. McKeithen*, 89 S.Ct. 1843, 395 U.S. 411, 23 L.Ed. 404 (1969), *et al.*, proscribing dismissal of a complaint unless it appears that plaintiff could prove no set of facts in support of his claim which would entitle him to relief. See: S.Ct. Rule 17.1(a), (c). For these reasons, therefore, the grant of a writ of certiorari should issue herein based upon the following argument:

ARGUMENT

I

THE FEDERAL DISTRICT COURT POSSESSED JURISDICTION TO REVIEW THE GENERAL COUNSEL'S ALLEGED ABUSE OF HIS STATUTORY DISCRETION

Regardless of the validity of the frequently assumed legal principle that the General Counsel's decision not to issue an unfair labor practices complaint is totally discretionary and not generally subject to judicial review, there was jurisdiction to consider the merits of Petitioner's Complaint under the circumstances of the instant case.

Even a cursory review of the Complaint reveals that the suit was fundamentally based upon allegations that the General Counsel withdrew the ULP complaint and dismissed the charges on a stated basis which was contrary to established Board legal precedent thereby constituting an abuse of discretion.[2]

---

[2]The General Counsel dismissed the International's ULP complaint below on the asserted ground that the International's reliance on pooled ratification voting was unlawful notwithstanding Board precedent in *Lynchburg* which held: "The pooled ratification procedure utilized by respondents was lawful under the Act. . . ."

There can be no serious question that a District Court has jurisdiction to review discretionary action of an administrative agency which is erroneous as a matter of law and, thus, an abuse of its administrative discretion. *Leedom v. Kyne,* 358 U.S. 184, 79 S.Ct. 180, 3 L.Ed.2d 210 (1958); *Harmon v. Brucker,* 355 U.S. 579, 78 S.Ct. 433, 2 L.Ed.2d 503 (1958); See *Panama Canal Co. v. Grace Lines, Inc.,* 356 U.S. 309, 78 S.Ct. 752, 2 L.Ed.2d 788 (1957); *McCulloch v. Sociedad Nacional, etc.,* 372 U.S. 10, 83 S.Ct. 671, 9 L.Ed.2d 547 (1963); *Pacific Southwest Airlines v. NLRB, supra,* at page 1312; *Bova v. Pipefitters & Plumbers Local 60,* 554 F.2d 226, 228-229 (footnotes 12 and 13) (5th Cir. La. 1977); *Bays v. Miller,* 524 F.2d 631, 632-633 (9th Cir. Cal. 1975); *Balanyi v. IBEW,* 374 F.2d 723, 726 (7th Cir. Ill. 1967); *So. Cal. Dist. Coun. Lab. Loc. 1184 v. Ordman,* 318 F.Supp. 633, 636 (C.D. Cal. 1977).

It is curious that the Circuit Court cited the PSA case for the proposition that a decision not to issue an unfair labor practice complaint is normally not subject to judicial review (CR-29:1). The *PSA* case more properly holds that the Board decision was not a proper subject for direct review *by the Circuit Court* under the provisions of section 10(f) of the Act. The majority opinion specifically notes that review of the Board's action, if any, would properly lie in the District Court. The dissenting judge in the *PSA* case was of the opinion that the Circuit Court had authority to review the administrative action. Contrary to the opinion of the District Court below, that there was no jurisdiction for judicial review under the circumstances of the case, all three judges in the *PSA* case felt that some judicial review might be appropriate but disagreed upon the proper forum. *Pacific Southwest Airlines v. NLRB,* supra at 1311-1313.

The gravamen of Petitioner's Complaint was that the General Counsel abused his discretion and deprived Petitioner of due process of law in ordering the withdrawal and dismissal of the unfair labor practices complaint in contravention and departure from established prior precedent

and decisional law governing the legality of pooled ratification procedures as enunciated in *United Steel Workers Union and Lynchburg Foundry Co.*, 192 NLRB 773 (1971). (CR-1:6-7). The issue presented to the District Court was therefore, "a purely legal question" as observed by the District Court in *So. Cal. Dist. Council of Lab. v. Ordman*, 318 F.Supp. 633, 636 (D.C. Cal. 1970). There the General Counsel dismissed plaintiff's unfair labor practice under the six month statute of limitations of NLRA § 10(b). In disputing the General Counsel's interpretation of that section, the District Court found itself empowered to reinstate plaintiff's unfair labor practice stating:

> "Under the undisputed facts of this case, however, defendant, because of its incorrect application of § 10(b), refused even to consider plaintiffs' charges. The interpretation of the statute of limitations is a purely legal question, distinguishable from questions of administrative policy requiring the special expertise of the General Counsel. Moreover, judicial resolution of this question is essential to prevent the erroneous construction of § 10(b) from barring henceforth, the General Counsel's investigation of otherwise valid charges.
>
> "The peculiar facts presented herein make this, thus, an extreme case which compels limited judicial action. Under these circumstances, there is ample authority to support a finding of jurisdiction in this Court. See *McCulloch v. Sociedad Nacional, etc.*, 372 U.S. 10, 83 S.Ct. 671, 9 L.Ed.2d 547 (1963); *Leedom v. Kyne*, 358 U.S. 184, 79 S.Ct. 180, 3 L.Ed.2d 210 (1958); *Hotel Employees Local No. 255 v. Leedom*, 358 U.S. 99, 79 S.Ct. 150, 3 L.Ed.2d 143 (1958); *Office Employees International Union Local No. 11, AFL-CIO v. N.L.R.B.*, 353 U.S. 313, 77 S.Ct. 799, 1 L.Ed.2d 846 (1957)."

Similarly, the General Counsel herein, by failing to apply *Lynchburg* to the disposition of plaintiff's unfair labor practice committed an error of law which was subject to remedy by the District Court.

II

THE GENERAL COUNSEL'S DECISION TO WITHDRAW AND DISMISS THE INTERNATIONAL'S ULP COMPLAINT IS PRESUMPTIVELY REVIEWABLE

As a general proposition, a complainant in an administrative procedure has standing to challenge agency action abridging his interests where those interests are within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question. *Data Processing Service v. Camp,* 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970); 5 U.S.C. § 701. In granting review of a regulation promulgated by the comptroller of the currency, this Court noted that, where statutes are concerned, the trend is toward an enlargement of the class of people who may protest administrative action and that the whole drive for enlarging the category of aggrieved "persons" is symptomatic of that trend. *Ibid.* at 154.

In *Barlow v. Collins,* 397 U.S. 159, 90 S.Ct. 832, 25 L.Ed. 2d 192 (1970), decided the same day, this Court approved the judicial challenge of a regulation which had been promulgated by the Secretary of Agriculture. Citing the *Data Processing* case, this Court held that the petitioners had standing to sue as persons with a personal stake and interest in the regulation and clearly within the zone of interests protected by the APA. Of particular significance to the instant case is the manner in which the Court dealt with the issue whether judicial review was precluded by Section 701(a) of the APA. The general principles governing standing were outlined by this Court as follows:

> "As we said in *Data Processing Service,* preclusion of judicial review of administrative action adjudicating private rights is not lightly to be inferred. See *Leedom v. Kyne,* 358 U.S. 184, 3 L.Ed.2d 210, 79 S.Ct. 180; *Harmon v. Brucker,* 355 U.S. 579, 2 L.Ed.2d 503, 78 S.Ct. 433; *Stark v. Wickard,* 321 U.S. 288, 88 L.Ed. 733, 64 S.Ct. 559; *American School of Magnetic Healing v. McAnnulty,* 187 U.S. 94, 47 L.Ed. 90, 23 S.Ct. 33. In-

deed, *judicial review of such administrative action is the rule, and nonreviewability an exception which must be demonstrated.* In *Abbott Laboratories v. Gardner,* 387 U.S. 136, 140, 18 L.Ed.2d 681, 686, 87 S.Ct. 1507, we held that:

> 'Judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress.'

"A clear command of the statute will preclude review; and such a command of the statute may be inferred from its purpose. *Switchman's Union v. National Mediation Board,* 320 U.S. 297, 88 L.Ed. 61, 64 S.Ct. 95. It is, however, "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent" that the courts should restrict access to judicial review. *Abbott Laboratories v. Gardner, Supra,* at 141, 18 L.Ed.2d at 687. The right of judicial review is ordinarily inferred where congressional intent to protect the interests of the class of which plaintiff is a member can be found; in such cases, unless members of the protected class may have judicial review, statutory objectives might not be realized. See the *Chicago Junction Case,* 264 U.S. 258, 68 L.Ed. 667, 44 S.Ct. 317; *Hardin v. Kentucky Utilities, Supra.*"

Similarly, in accepting a petition for review of an order of the Occupational Safety and Health Review Commission, the Ninth Circuit has stated in *Marshall v. Union Oil Co. of California,* 616 F.2d 1113, 1117 (9th Cir. Cal 1980):

> "This Court, following the Supreme Court's lead, has consistently held that judicial review of agency action 'will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress.' (Citations). There is no presumption against judicial review and in favor of administrative absolutism. . . . unless that purpose is fairly discernible in the statutory scheme."

Of significance to the instant case by analogy is the decision of this Court in *Dunlop v. Bachowski*, 421 U.S. 560, 95 S.Ct. 1851, 44 L.Ed.2d 377 (1975). In that case, a defeated candidate for union office, after exhausting his remedies within the union, filed a complaint with the Secretary of Labor alleging violations of the Labor-Management Reporting and Disclosure Act. (LMRDA). When the Secretary declined to bring a civil action to set aside the election, the candidate filed suit in the United States District Court seeking a declaration that the actions of the Secretary were arbitrary and capricious and seeking an order directing the Secretary to file suit to set aside the election. The District Court dismissed the action concluding that it lacked jurisdiction. On certiorari, this Court agreed with the Circuit Court of Appeals that the District Court had jurisdiction of the suit pursuant to the provisions of 28 U.S.C. § 1337 as a case arising under an act of Congress regulating commerce and that Sections 702 and 704 of the APA subjected the Secretary's decision to judicial review as "final agency action for which there was no other adequate remedy in a court" and that judicial review was not precluded by Section 701(a) of the APA. *Ibid.* at 566.

In reaching these conclusions, this Court observed that the LMRDA contained no provision which explicitly prohibited judicial review of the decision of the Secretary not to bring a civil action even though 29 U.S.C. § 483 specifically provided that "the remedy provided by this subchapter for challenging an election already conducted shall be exclusive." In the absence of an expressed prohibition by the Act, this Court concluded that the Secretary bears a heavy burden of overcoming the strong presumption that Congress did not intend to prohibit all judicial review of his decision. In support of this statement, the Court quoted the following language from *Abbott Laboratories v. Gardner, Supra,*:

> "The question is phrased in terms of 'prohibition' rather than 'authorization' because a survey of our

cases shows that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress. (Citations)."

"[*O*]*nly upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review.* (Citations)." (Emphasis supplied)

Holding that the Secretary had failed to sustain his burden of demonstrating that Congress meant to prohibit all judicial review of his decision by clear and convincing evidence, the Court concluded that Courts "are necessarily [not] without power or jurisdiction . . . if it should clearly appear that the Secretary acted in an arbitrary and capricious manner by ignoring the mandatory duty he owes plaintiffs under the powers granted by Congress" (Citations).

Of particular relevance to the authority of the General Counsel of the NLRB, this Court's *Dunlop* decision acknowledged that Congress in enacting the LMRDA, settled exclusive enforcement jurisdiction on the Secretary and granted him broad investigative powers in order to best serve the public interest. *Ibid.* at 568 citing *Calhoun v. Harvey*, 379 U.S. 134, 85 S.Ct. 292, 13 L.Ed.2d 190 (1964). Although having made a suit by the Secretary the exclusive post-election remedy, the Court determined Congress had not foreclosed a judicial challenge under the provisions of the APA by an aggrieved party. *Ibid.* at 569-570. The Court concluded in *Dunlop* that, although a reviewing court was not authorized to substitute its judgment for the decision of the Secretary not to bring suit, the Secretary was required to provide the Court and complainant with a statement of reasons supporting his determination sufficiently specific to enable a reviewing court to determine with some measure of confidence whether or not the exercise of the Secretary's discretion was arbitrary or capricious. *Ibid.* at 571.

A. The Legislative History of the LMRA Indicates an Intent to Allow Judicial Review of the General Counsel's Decisions Not to Issue or Withdraw a Complaint Where Such Decisions Violate the Board's "Rules of Decision"

A review of the legislative history of the Labor Management Relations Act (LMRA) reflects that there was substantial discussion during the debate over the adoption of Section 3(d) in 1947 concerning the extent to which the General Counsel's decision would be unreviewable. See: Comments of Magnuson, 93 Cong. Rec. 6614; and, Comments of Murrary, 93 Cong. Rec. 6660-6661.

During the floor debate in 1947 on the adoption of Section 3(d), Senator Taft, one of the leading authors of the amendment, responded to criticism that "it places a tremendous amount of unreviewable power in the hands of a single official." (93 Cong. Rec. 6859, 2 Leg. Hist. of the LMRA 1623 [1947]). Senator Taft specifically stated during this debate that there were situations in which the decision of the General Counsel not to issue a complaint is reviewable:

> "What the conference amendment does is simply to transfer this 'vast and unreviewable power' from this anonymous little group [the Board's legal assistants] to a statutory officer responsible to the President and to the Congress. So far as having unfettered discretion is concerned, *he, of course, must respect the rules of decision of the Board and the Courts.*" (Emphasis supplied)

In addition, the LMRA as originally drafted and as subsquently amended, has always intended that the Board, not the General Counsel, formulate and announce by means of its formal decisions all significant interpretations of the Act. There is no provision in the Act delegating authority to the General Counsel to engage in quasi-administrative decision-making concerning significant interpretations of the Act, and then allowing him to exempt such decisions from judicial review by asserting that a decision not to issue a complaint in a given fact circumstance is within the

General Counsel's "prosecutorial" discretion. Rather, Section 10(f) of the Act expressly guarantees that "any person aggrieved" by final action of the Board or its agents (such as the General Counsel), granting or denying relief sought, may seek judicial review.

In sum, Section 3(d) is nothing more than a statement of the limits of the General Counsel's authority, i.e., General Counsel exercises general supervision over the attorneys, officers and members of the Board and has "final authority, *on behalf of the Board*" in respect to the investigation of charges and issuance of complaints and prosecution of complaints. This is not the type of declaration of nonreviewability which bars judicial review within the meaning of section 701(a) of the A.P.A. Cf. *Califano v. Sanders*, 430 U.S. 99, 97 S.Ct. 980, 51 L.Ed.2d 192 [Review of action of Secretary of Health, Education and Welfare under Social Security Act not subject of review under A.P.A. since judicial review was specifically precluded by statute].

B. The General Counsel's Prosecutorial Discretion Cannot Foreclose Judicial Review of the International's Private Rights

In support of the dismissal of Petitioner's Complaint below, both the attorney for the Board and the District Court relied upon the oft recited proposition that the General Counsel acts with absolute unfettered prosecutorial discretion in the public interest without allowance for the assertion of private rights. (CR-34:8).

The parameters of the General Counsel's "prosecutorial discretion" were addressed by this Court in its decision in the matter of *International Union, Local 283 v. Scofield*, 382 U.S. 205, 86 S.Ct. 373, 15 L.Ed.2d 272 (1965). There this Court held that both the charging and charged party in proceedings before the NLRB may intervene in Section 10(f) enforcement proceedings in the Circuit Court of Appeals. In reaching this decision, the Court carefully considered and balanced the rights and responsibilities of the

parties and of the General Counsel. As the following language from *International Union* reflects, the Supreme Court rejects the proposition relied upon by the District Court that the Board is the custodian of the "public interest" to the exclusion of the so-called "private interest" at stake:

> "In prior decisions, this Court has observed that the Labor Act recognizes the existence of private rights within the statutory scheme. These cases have, to be sure, emphasized the 'public interest' factor. To employ the rhetoric of 'public interest', however, is not to imply that the public right excludes recognition of parochial private interests." *Ibid.* at 218.

Reviewing the statutory scheme and Board's Rules and Regulations, the Court continued as follows:

> "The statutory machinery begins with the filing of an unfair labor practice charge by a private person (citing authority). When the General Counsel issues a complaint and the proceeding reaches the adjudicative stage, the course the hearing will take is in the agency's control, but the charging party is accorded formal recognition. He participates in the hearing as a 'party'. He may call witnesses and cross-examine others, may file exceptions to any order of the trial examiner and a petition for reconsideration to a Board order (citing authorities). Of course, if the Board dismisses the complaint, he can obtain review as a person aggrieved, which serves the 'public interest' by guaranteeing that the Board interpretation of relevant provisions accords with the intent of Congress. And *that the charging party may have vital 'private rights' in the Board proceeding is clear* in this very case, which also involves, potentially, a breach of the parties' collective bargaining agreement." *Ibid.* at 219-220 (Emphasis supplied)

The Court concluded with the following statement:

> "In short, we think that *the statutory pattern of the*

> ***Labor Act does not dichotomize 'public' as opposed to 'private' interests.*** Rather, the two interblend in the intricate statutory scheme." *Ibid.* at 220. (Emphasis supplied).

This Court has retained these limitations upon the General Counsel's discretion as first dilineated in *International Union, supra.* In determining the availability of Board memoranda to requests under the Freedom of Information Act in *National Labor Relations Board v. Sears Roebuck & Co.,* 421 U.S. 132, 95 S.Ct. 1504, 44 L.Ed.2d 29 (1975), this Court again considered the assertion by the General Counsel that his decisions were unreviewable as part of his prosecutorial discretion. This Court dismissed the General Counsel's attempt to analogize his role to that of a public prosecutor, stating:

> "General Counsel's analogy is far from perfect. The General Counsel, unlike most prosecutors, may authorize the filing of the complaint with the Board only if a private citizen files a 'charge.' 29 U.S.C. §§ 153(d) and 160(b) [29 U.S.C. §§ 153(d) and 160(b); 29 CFR § 101.2; *Autoworkers v. Scofield,* 382 U.S. 205, 219, 15 L.Ed.2d 272, 86 S.Ct. 373 (1965); *NLRB v. Indiana Michigan Electric Co.,* 318 U.S. 9, 18, 87 L.Ed. 579, 63 S.Ct. 394 (1964)]. Unlike the victim of a crime, the charging party will, if a complaint is filed by the General Counsel, become a party to the unfair labor practice proceeding before the Board. (Citing authority). And, if an unfair labor practice is found to exist, the ensuing cease-and-desist order will, unlike the punishment of the defendant in a criminal case, coerce conduct by the wrongdoer flowing particularly to the benefit of the charging party. For these reasons, *we have declined to characterize the enforcement of the laws against unfair labor practices either as a wholly public or wholly private matter.* (Citing authorities)."

Carrying the authority and logic of this Court's pronouncements to their logical conclusion, Judge Real, dissenting in *Pacific Southwest Airlines v. NLRB,* 611 Fed.

2d 1309 (9th Cir. Cal. 1980), responded to the General Counsel's historical, but unfounded assertion that he had the discretion of a public prosecutor as follows:

> "A public prosecutor is elected or appointed to vindicate societal interests through the integrity of our criminal laws. Individual interests may benefit peripherally but that is neither the function of nor the result of a public prosecutor in the performance of his duty. General Counsel in contrast, takes the position of an individual or entity in the vindication of a right particularly of personal interest to that individual or entity. The public may incidentally be benefited by peace in our industrial establishment but private rights are the primary concern of the function of General Counsel under the NLRA." *Ibid.* at 1313.

At all events, since Petitioner was plainly possessed of "vital private rights" as a party to the ULP proceeding, the General Counsel was foreclosed from unsurping those rights by dismissal of the ULP complaint in reliance upon a judicially rejected claim of absolute, unreviewable prosecutorial discretion.

III

THE GENERAL COUNSEL'S WITHDRAWAL AND DISMISSAL OF APPELLANT'S ULP COMPLAINT WITHOUT HEARING EXCEEDED THE STATUTORY PURVIEW OF HIS DISCRETION

An essential element of the District Court's decision was its finding that there was no logical or legal distinction between an initial decision by the General Counsel not to file a complaint and a subsequent decision to withdraw a complaint and dismiss charges (Pg. A-14, *District Opinion*, Appendix). To the contrary, a substantial body of law supports Petitioner's contention that once a complaint has issued, the scope of the General Counsel's discretion terminates and the statutory scheme contemplates that the complaint proceed to hearing and be subject to judicial review.

In *Leeds & Northrup Co. v. NLRB*, 357 Fed.2d 527 (3rd Cir. Pa. 1966), the Court considered the reviewability of an informal settlement agreement and withdrawal of a ULP complaint which had been approved by the General Counsel. The charging party sought review in the Court of Appeals pursuant to the provisions of § 10(f) of the Act, and the General Counsel opposed the petition on the ground that there had been no formal order subject to judicial review. Relying upon the APA and the *Scofield* case, *supra*, the Court held that the informal settlement and withdrawal of the complaint was reviewable. In reaching its decision, the Court made the following observations:

> *"Clearly, once a complaint issues the statutory scheme contemplates Board Action. Anything less, such as informal actions of its agents in dismissing such complaint over the objections of the charging party, is arbitrary and capricious.* This is not to say that this Court seeks to project itself into the orderly administration of the affairs of the National Labor Relations Board and its Regional Agents . . . but we do conclude that if an amicable adjustment of a labor dispute cannot be brought about through informal negotiations with the consent of all parties, after the issuance of a complaint, then such informal proceedings must be formalized for Board action within the statutory scheme, thereby creating a record for judicial review."
>
> "Turning now to the central issue, we are called upon to determine whether the Company was entitled to a hearing on its objections to the informal settlement or compromise, entered into between the Regional Director and the charged party, the Union. As pointed out by this Court in *Marine Engineers Ben. Ass'n. No. 13 v. National Labor Rel. Bd.*, 202 Fed.2d 546, 549 (3 Cir. 1953), cert. den. 346 U.S. 819, 74 S.Ct. 32, 98 L.Ed. 345 (1953), this is a question of law. On the authority of that case, as well as upon our conception of the statutory design discussed previously, once a complaint is issued, the charging party is entitled to an evidentiary

hearing upon its objections to the proposed settlement agreement, be it formal or informal. In *Marine Engineers,* at page 549, the following appears:

> 'Our best judgment is that the charging party, after complaint is issued, does have some standing. (citing auth.) *The Board may refuse to do anything about his complaint as already indicated. But once it does, and once it goes to the extent of filing a complaint, then we think that he is entitled to have a chance to be heard as the Administrative Procedure Act requires.* He has a right to object if after hearing he does not like the result. But he certainly has nothing on which to base his objections unless there is a hearing and the record is made so that the court has something to go on.' (citing auth.)

"Both the Labor Management Relations Act, 29 U.S.C.A. §§ 160(c), 160(f) and the Administrative Procedure Act, 5 U.S.C.A. §§ 1005(b), 1006(d), 1007(b), require a record to be made for a reviewing court." *Ibid.* at 533. (Emphasis supplied.)

All circuits, which have considered this issue, have held that, once, an unfair labor practice complaint has been filed, the charging party is entitled at a minimum, to a hearing upon any material issues of disputed fact or a presentation on the record of an explanation for the failure of the Board to proceed to a final adjudication. *Waterway Terminals Company v. NLRB,* 467 F.2d 1011 (9th Cir. Cal. 1972) [Circuit Court review of NLRB order quashing notice of hearing on ULP charges after section 10(K) court review after proceedings begun and factual record made was tantamount to a hearing on the complaint and constituted "final order"] *NLRB v. International Bro. of Elec. Wkrs. Loc. Un., 357,* 445 F.2d 1015 (9th Cir. Cal. 1971); *Oshkosh Truck Corp. v. NLRB,* 530 F.2d 744 (7th Cir. Wis. 1976); *International Ladies Garment Wkrs. Un., etc. v. NLRB,* 501 F.2d 823 (D.C. Cir. 1974); *NLRB v. Oil Chemical & Atomic Workers Int. Un.,* 476 F.2d 1031 (1st Cir.

P.R. 1973); *Concrete Materials of Georgia, Inc. v. NLRB*, 440 F.2d 61 (5th Cir. Ga. 1971).

And, the Circuit Court's citation, herein, to *George Banta Co. v. NLRB*, 626 F.2d 354 (4th Cir. 1980), does not alter this conclusion. Pg. A-11 *Circuit Opinion*, Appendix. In *Banta* the Fourth Circuit found that its decision did "not depend upon whether or not (the General Counsel) has issued a complaint," but upon whether "the decision is fundamentally prosecutorial—based essentially upon a determination that the available evidence will not support prosecution of the alleged violation." *Ibid* at 356. The alleged violation in the instant case was premised on an admitted fact that the employer, Lockheed, chose to circumvent the certified collective bargaining representative, the International Association of Machinists and Aerospace Workers, and deal directly with its constituent lodges. The General Counsel made no *evidentiary* finding that the International's charge could not be sustained. Thus, his decision to withdraw the ULP in this instance did not fall within the purview of his prosecutorial discretion.

IV

THE "POLICY CONSIDERATIONS" OF REVIEWABILITY MILITATE IN FAVOR OF JUDICIAL REVIEW OF THE GENERAL COUNSEL'S DECISION PURSUANT TO THE PROVISIONS OF THE ADMINISTRATIVE PROCEDURE ACT[9]

In its opinion in *Local 2855, AFGE (AFL-CIO) v. United States*, 602 F.2d 574 (3rd Cir. NJ 1979), the Third Circuit addressed itself to the exempting provisions of the APA as it pertains to decisions "committed to agency discretion by law." 5 U.S.C. § 702. While the Circuit herein cited the foregoing APA provision as foreclosing judicial review in

[9]The Ninth Circuit joins with the Seventh Circuit in concluding that the General Counsel's discretion is "committed to agency discretion by law" as regards decisions respecting the issuance of ULP complaints. *Balayni v. IBEW*, 374 F.2d 723 (7th Cir. Ill. 1967). Contrariwise, the District of Columbia Circuit along with the Third

the instant case, the Third Circuit's opinion recommends that the federal courts abide by the "hospitable interpretation" exhortation of this Court in resolving reviewability under the APA, stating at page 578 of its opinion that:

> "The Supreme Court has emphasized repeatedly that the APA's "'generous review provisions' must be given a 'hospitable' interpretation," and that "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." Thus, in the absence of a specific statutory preclusion of review, agency action may be determined to be "committed to agency discretion by law" *only when a fair appraisal of the entire legislative scheme, including a weighing of the practical and policy implications of reviewability, persuasively indicates that judicial review should be circumscribed.*
>
> • • • •
>
> "In the same vein, the legislative history of the APA, referred to in *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 410, 91 S.Ct. 814, 821, 28 L.Ed.2d 136 (1971), indicates that the committed to agency discretion exception to judicial review is intended to be "applicable in those rare instances *where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'* S. Rep. No. 752, 79th Cong. 1st Sess., 26 (1945)." (Emphasis supplied)

Expanding upon the Third Circuit's concept of judicial reviewability, where "practical and policy considerations" militate in favor of such, and denying reviewability where "in a given case there is no law to apply," the District of

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and Fifth Circuits has recognized that judicial review lies under the APA where the Board or General Counsel has departed from past policies and precedent. *Local 777, Democratic Union Organizing Committee, SIU-AFL-CIO v. NLRB* (D.C. Cir. 1979), *supra; Local 2855, AFGE (AFL-CIO) v. United States* (3rd Cir. 1979), *supra; Marriott In-Flite Services Division of Marriott Corp. v. NLRB* (5th Cir. 1969), *supra.* See: S.Ct. Rule 17.1(a) (conflict between the circuits)

Columbia Circuit commented in *Natural Resources Defense Council, Inc. v. S.E.C.*, 606 F.2d 1031, 1043-1044 (D.C. Cir. 1979), that the test is a single inquiry to determine whether a matter is committed to agency discretion:

> "In practice, the determination of whether there is law to apply necessarily turns on pragmatic considerations as to whether an agency determination is the proper subject of judicial review. See *Lagevin v. Chenango Coiurt, Inc.*, 447 F.2d 296 (2nd Cir. 1971); *Medical Committee for Human Rights v. SEC*, 139 U.S. App. D.C. 226, 234, 432 F.2d 659, 667 (1970), vacated and remanded with instructions to dismiss as moot, 404 U.S. 403, 92 S.Ct. 577, 30 L.Ed.2d 560 (1972); Saferstein. *Nonreviewability: A Functional Analysis of 'Committed to Agency Discretion,'* 82 Harv. L.Rev. 367 (168). In making this determination, we first identify as precisely as possible the aspects of the agency's action against which challenge is brought. We then evaluate the relevance of three particularly important factors: the need for judicial supervision to safeguard the interests of the plaintiffs; the impact of review on the effectiveness of the agency in carrying out its congressionally assigned role; and the appropriateness of the issues raised for judicial review. See *Hahn v. Gottlieb*, 430 F.2d 1243 (1st Cir. 1970). Finally, we inquire whether the considerations in favor of nonreviewability thus identified are sufficiently compelling to rebut the strong presumption of judicial review."

At all events, case and statutory experience have clearly demonstrated that the LMRA is hardly "drawn in such broad terms that in a given case there is no law to apply." Indeed, in the instant case it is because there is a "law to apply," to wit, the *Lynchburg* doctrine, that judicial review is mandated. But, Petitioner need not rely on this ground alone, since a review of the "policy considerations" hereafter set forth likewise militate in favor of judicial review under the APA.

A. The Grant of Judicial Review to the General Counsel's Decisions Would Ensure Development of Consistent Standards to Govern His Discretion

Judicial scrutiny of the General Counsel's "discretionary" decisions to issue, deny or withdraw ULP complaints will ensure that the administrative process through which the General Counsel acts is guided by legal concepts and governed by the doctrine of *stare decisis*. The public consumer of the statutory benefits of the LMRA is entitled to rely upon the Act's vast decisional authority as the measure of his rights under the statute. In *Local 777, Democratic Union Organizing Committee, SIU-AFL-CIO v. NLRB*, 603 F.2d 862, 871-872 (D.C. Cir. 1979), the District of Columbia Circuit emphasized the need to require the NLRB to follow, distinguish or overrule its own precedent. Chastizing the Board for failing to abide by its past pronouncements regarding the status of independent contractors vis-a-vis employees in the operation of cabs, the Court remarked:

> "The vacillation of the NLRB in regard to the question of the status of cab leasing makes an attitude of judicial deference to its decision especially inappropriate. The Board cannot, despite its broad discretion, arbitrarily treat similar situations dissimilarly, e.g., *Carnation Company v. NLRB*, 429 F.2d 1130 (9th Cir. 1970); *Burlington Truck Lines v. United States*, 371 U.S. 156, 83 S. Ct. 239, 9 L.Ed.2d 207 (1962); *NLRB v. WGOK, Inc.*, 84 F.2d 500 (5th Cir. 1967); *Burinskas v. NLRB*, 123 U.S. App. D.C. 143, 357 F.2d 822 (1966). When it both fails to distinguish contradictory decisions rendered in similar cases and also misapplies accepted principles of law, it errs doubly, *NLRB v. Metropolitan Life Insurance Co.*, 380 U.S. 438, 443, 85 S. Ct. 1061, 13 L.Ed.2d 951 (1965). *An agency in its deliberations is under an obligation to follow, distinguish, or overrule its own precedent, Brown v. NLRB*, 462 F.2d 699 (9th Cir.), *cert. denied*, 409 U.S. 1008, 93 S. Ct. 441, 34 L.Ed.2d 301 (1972);

May Department Stores Co. v. NLRB, 454 F.2d 148 (9th Cir.), *cert. denied*, 409 U.S. 888, 93 S. Ct. 116, 34 L.Ed.2d 144 (1972); *Carnation Co. v. NLRB, supra.* The NLRB has clearly failed to discharge this obligation here, and its actions indicate that lack of reasoned articulation and responsibility that vitiates the deference we would otherwise show to its very considerable expertise in strictly labor matters. *NLRB v. Madison Courier, Inc.*, 153 U.S. App. D.C. 232, 472 F.2d 1307 (1972), *Office of Professional Employees International Union, Local 425, AFL-CIO v. NLRB*, 136 U.S. App. D.C. 12, 419 F.2d 314 (1969). *Ibid.* at 871-872.

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Although an agency may change its policy as it determines is in the public interest, e.g., NLRB v. Wentworth Institute, 515 F.2d 550 (1st Cir. 1974) when, as here, it announces no principled reason for such a reversal, its action is arbitrary and the courts should be quick to so declare. We have previously held that "an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored," *Greater Boston T.V. Corp. v. FCC*, 143 U.S. App. D.C. 383, 394, 444 F.2d 841, 852, *cert. denied*, 403 U.S. 923, 91 S. Ct. 2229, 29 L.Ed.2d 701 (1971); *International Union v. NLRB*, 148 U.S. App. D.C. 305, 317, 459 F.2d 1329, 1341 (1972) ('It is an elementary tenet of administrative law that an agency must either conform to its own precedents or explain its departure from them'); *Public Service Commission v. FPC*, 167 U.S. App. D.C. 100, 115, 511 F.2d 338, 353 (1975); *Garrett v. FCC*, 168 U.S. App. D.C. 266, 270, 513 F.2d 1056, 1060 (1975); see *NLRB v. International Union of Operating Engineers, Local 925 AFL-CIO*, 460 F.2d 589, 604 (5th Cir. 1972); *NLRB v. Silver Bay Local Union*, 498 F.2d 26 (9th Cir. 1974); see *Atchison, T. & S.F. R. Co. v. Wichita Board of Trade*, 412 U.S.

800, 808, 93 S. Ct. 2367, 37 L.Ed.2d 350 (1973). In this case, whether or not it would be proper actually to work an estoppel against the government, see generally, Davis *Administrative Law in the Seventies* 339-404 (1976), the vacillation of the Board's approach compels its demand. We deny enforcement of the Board's order because we are able to determine that the lessees in this case were independent contractors, but even were this not possible on the record before us, we would not grant enforcement without first having received from the Board an intelligible rationale for the distinctions they have drawn between employees and independent contractors." *Ibid.* at 882 (Emphasis supplied.)

An identical approach has been taken by the Fifth Circuit in *Marriott In-Flite Services Division of Marriott Cor. v. NLRB,* 417 F.2d 563, 565 (5th Cir. La. 1969). In *Marriott* the Court took objection to the Board's departure from its policy of providing foreign language balloting in representation elections, stating:

"If the agency establishes a general policy and then departs from it, *judicial approval of the departure will be withheld in the absence of an explanation.* Thus in *Rayonier, Inc. v. NLRB,* 5 Cir. 1967, 380 F.2d 187, we denied enforcement of a Board order and quoted approvingly the following language of Judge Aldrich:

'The Board is free, of course, to make changes in policy, but the seriousness of this one, if that is what it is, would call not only for deep and mature thought, but for the assembly of the most cogent reasons. In the Board's opinion I find neither. [*Northeast Airlines v. C.A.B.,* 1 Cir. 1964, 331 F.2d 579, 589].' 380 F.2d at 190.

Similarly, Judge Brown, concurring in *Mary Carter Paint Co. v. FTC,* 5 Cir. 1964, 333 F.2d 654, rev'd on other grounds, 1965, 382 U.S. 46, 86 S. Ct. 219, 15 L.Ed.2d 128, pointed out that:

> [the] law does not permit an agency to grant to one person the right to do that which it denies to another similarly situated. There may not be a rule for Monday, another for Tuesday, a rule for general application, but denied outright in a specific case.
>
> That description fits exactly the Board's conduct here.
>
> More recently, in *Delta Drilling Co. v. NLRB*, 5 Cir. 1969, 406 F.2d 109, this Court set aside an election in which the Board's agent had stopped off at a union representative's motel room while carrying the ballots away from the polling place. No evidence of ballot-tampering appeared. We noted, however, that the agent's behavior violated 'established Board Policy', 406 F.2d at 112, and that '[s]uch policies are controlling until the Board announces a change and its reasons for the change.' 406 F.2d at 113."

Applying the standards of these Circuit decisions to the case before us, judicial review is compelled. The *Lynchburg* doctrine, sustaining a union's right to insist upon the pooled voting of its constituent locals in a contract ratification election, has never been reversed, distinguished or questioned in any Board decision. It is binding decision of the NLRB and part of the considerable legal precedent governing the Board and the General Counsel in their deliberations, actions and decisions under the statute. At no time did the General Counsel or the Board offer any explanation or excuse for departing from the *Lynchburg* doctrine. Recognizing that the General Counsel is possessed with the right and discretion to amend or abandon *Lynchburg*, such a departure in policy can only be judicially sanctioned where there is a "principled reason for such a reversal" (*Local 777, Democratic Union Organizing committee, SIU-AFL-CIO v. NLRB, supra* at 882) based upon "the most cogent reasons" (*Marriott In-Flite Services Division of Marriott Corp. v. NLRB, supra*, at 565); otherwise, "judicial approval of the departure will be withheld." *Ibid.* By the foregoing principle, therefore, the General

Counsel's decision herein should be subjected to judicial scrutiny since the record is devoid of a "principled reason" for his abandonment of the *Lynchburg* doctrine.

B. The Grant of Judicial Review to the General Counsel's Decisions Would Prevent Unwarranted Intrusions into the Internal Affairs or Labor Unions and Frustration of the Principles of Collective Bargaining Underlying the NLRA

It was the stated intent of the General Counsel and the Ninth Circuit to deny to the International the "pooled ratification" procedures approved in *Lynchburg*. As previously noted, the General Counsel declined to articulate his abandonment or withholding of *Lynchburg* from the facts of this case. The Circuit Court was, however, undaunted by this fact and proceeded to find that since the International had failed to exercise its option to require pooled ratification voting of its constituent lodges in past negotiations with Lockheed, the International had effectively waived its rights under *Lynchburg*. Pg. A-5, *Circuit Opinion*. Appendix. The Circuit Court also found that the International "never presented the NLRB with any legitimate objectives to be achieved by pooled ratification." Pg. A-10, *Circuit Opinion*, Appendix.

What the General Counsel and the Ninth Circuit failed to recognize, however, was the fact that the pooled ratification procedures were an integral part of the International's Constitution and governing rules and policies.[4] It was nothing less than presumptuous for the General Coun-

[4]Circular No. 596 constituted a formal policy statement of the International President respecting multi-unit bargaining agreements providing that:

> "Prior to any vote to accept or reject a proposed agrement by an IAM bargaining unit affected by multi-unit agreements with the same employer, company or corporation, *the International President* or his designated representative or *an authorized committee* shall determine whether all the units shall be combined for voting purposes or shall be permitted to vote separately or in what combination. . . ." (CT 370) (Emphasis supplied).

sel and the Circuit Court to say when or how the International would exercise its internal rules. This Court in its decision in *Boilermakers v. Hardeman*, 91 S. Ct. 609, 401 U.S. 233, 246, 28 L.Ed.2d 10 (1971), enunciated a principle of exercising sound reluctance to interfere with internal union affairs, which principle has been followed by the Circuit Courts. See: *Busch v. Givens*, 627 F.2d 978, 981 (9th Cir. Cal. 1980); *Kahn v. Hotel & Restaurant Employees and Bartenders International*, 597 F.2d 1317 (9th Cir. Cal. 1979); *Stelling v. Brotherhood of Electrical Workers*, 587 F.2d 1378, 1389 (9th Cir. Cal. 1978); *Blanchard v. Johnson*, 532 F.2d 1074, 1078 (6th Cir. Ohio 1976); *Gurton v. Arons*, 339 F.2d 371, 375 (2nd Cir. N.Y. 1964).

The fact that the International had not previously insisted upon pooled ratification in its bargaining relationship with Lockheed does not justify the effective judicial negation of Circular No. 596. For as observed by the NLRB in *Lynchburg*, the mere fact that a union has not previously exercised its option to insist upon a pooled ratification vote does not constitute a waiver of its right in this regard. *United Steelworkers and Lynchburg Foundry, supra*, at 788. If the Ninth Circuit is allowed to not only usurp the judgment of the International as to when to call for a pooled ratification vote, but also to reject the NLRB's decision that no waiver occurs through a union's nonexercise of that right, then we are surely "apt to produce incompatible or conflicting adjudications" at odds with the NLRB to whom Congress confided "the primary power of interpretation and application of the Act." *Boilermakers v. Hardeman, supra* at 240; *NLRB v. Nash-Finch Co.*, 92 S. Ct. 373, 404 U.S. 138, 144-147, 30 L.Ed.2d 328 (1971); *Garner v. Teamsters Union*, 74 S. Ct. 161, 346 U.S. 485, 490-491, 98 L.Ed.2d 228 (1953).

Similarly, by denying the International recourse to pooled ratification voting in its dealings with Lockheed, the General Counsel tipped the scale decidedly in the employers' favor, upsetting the statutory balance between

labor and management. *NLRB v. Knuth Bros.*, 537 F.2d 950, 956-957 (7th Cir. Wisc. 1976); *American Ship Bldg. Co. v. NLRB*, 85 S. Ct. 955, 380 U.S. 300 316-317, 13 L.Ed. 2d 855 (1965). The keystone to bargaining strength is the right of a labor organization to engage in concerted actions. In fact, the Act provides that "employees shall have the right to self-organization, . . . to bargain through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . ." 29 U.S.C. § 157. Accordingly, the International was well within its rights, as the employees certified representative, to impose a pooled ratification voting procedure for the "mutual aid" and "protection" of its Lockheed bargaining units. Thus, the General Counsel's actions withdrawing the International's ULP, emasculating the International's Board given right to pooled ratification procedures, contravened the statutory rights of this petitioner to engage in concerted activities.

Lastly, to suggest that the International had an affirmative duty to justify the use of pooled ratification procedure to the NLRB is folly as it was given no opportunity or forum to offer an explanation. But, more importantly, it was under no legal obligation to do so. The Circuit Court's findings in this regard are without legal support.

V

DISMISSAL OF PETITIONER'S COMPLAINT PURSUANT TO FRCP 12(b)(1) CONTRAVENES THE POLICIES AND STATUTORY INTENDMENTS OF NOTICE PLEADING UNDER FRCP 8 AND CONSTITUTES A DENIAL OF DUE PROCESS

FRCP 8(a) provides as follows:

> "(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court

already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded."

FRCP 8(f) provides as follows:

"(f) Construction of Pleadings. All pleadings shall be so construed as to do substantial justice."

The District Court below acted pursuant to FRCP 12(b)(1) finding on the face of Petitioner's Complaint that it did not have subject matter jurisdiction to review the General Counsel's decision to withdraw an ULP complaint. Pg. A-14, *District Opinion*, Appendix. The vice of the District Court's action, if upheld, is to deprive a plaintiff from ever successfully litigating a complaint for abuse of discretion on the part of the General Counsel. By command of FRCP 8(a), plaintiffs are limited to the pleading of ultimate facts setting forth the basis of federal jurisdiction. The plaintiff is not required by FRCP 8(a) "to set out in detail the facts upon which he bases his claim."[9] *Conley v. Gibson*, 78 S. Ct. 99, 355 U.S. 41, 47-48, 2 L.Ed.2d 80 (1957). Yet, the clear message of the District Court's decision, and its affirmance by the Ninth Circuit, is that a mere allegation of abuse of discretion will justify dismissal for lack of subject matter jurisdiction.

The fact that the Ninth Circuit's decision looked to the underlying facts set forth in *Benda v. Grand Lodge Etc, supra*, in measuring the jurisdictional competency of the Complaint is an admission of the legal deficiencies of the District Court's summary dismissal. Pg. A-3, *Circuit Opin-*

[9]It is interesting to note that the Ninth Circuit has, from the outset, challenged this Court's interpretation of notice pleading under FRCP 8 proposing that FRCP 8(a) be amended "to contain the facts constituting a cause of action." 2a *Moore's Federal Practice*, ¶8.01 [4] (1982).

ion, Appendix. While attempting to affirm the District Court's dismissal of this complaint based upon a reference to the prior *Benda* action, the Circuit Court incorrectly presumes that Petitioner cannot develop new and additional facts not produced in *Benda*. It also impliedly admits that dismissal cannot be justified without reference to a factual record. The *Benda* decision was never a trial on the merits of factual allegations, but rendered upon a motion for preliminary injunction interposed by plaintiff Benda against the International. In short, Petitioner has never been afforded the opportunity to advantage itself of discovery procedures and develop a factual basis for its claims. This is the effect of the District Court's dismissal under FRCP 12(b)(1). It was a judicial finding that there can be no conceivable basis for jurisdiction.

But, such is not the rule under FRCP 8. As reflected by FRCP 8(f), "pleadings shall be so construed as to do substantial justice." That is to say, a complaint should not be dismissed unless it appears that plaintiff could prove no set of facts in support of his claim which would entitle him to relief. *Jenkins v. McKeithen*, 89 S. Ct. 1843, 395 U.S. 411, 422, 23 L.Ed. 404 (1969); *Glus v. Brooklyn Eastern Dist. Terminal*, 79 S. Ct. 760, 359 U.S. 231, 235, 3 L.Ed.2d 770 (1959); *Maty v. Grasselli Chemical Co.*, 58 S. Ct. 507, 303 U.S. 197, 200, 82 L.Ed. 745 (1938). And, to ignore this interpretation of FRCP 8, as the District and Circuit Courts have herein, so as to effectively deny Petitioner access to the federal courts for litigation of its claims, is to deny Petitioner its rights to due process of law. *Windsor v. McVeigh*, 93 U.S. 274, 277-278, 283-284, 23 L.Ed. 914 (1876).

CONCLUSION

For all of the foregoing reasons, this Court should grant certiorari.

Dated: October 25, 1982

Respectfully submitted,

JOHN F. HENNING, JR.
Counsel of Record

APPENDIX A

In the United States Court of Appeals
For the Ninth Circuit

No. 80-4331

International Association of Machinists and
Aerospace Workers, AFL-CIO,

vs.

William A. Lubbers, General Counsel of the
National Labor Relations Board, James S. Scott,
Regional Director, Region 32 of the National
Labor Relations Board, John H. Fanning, Chairman,
and Members Howard Jenkins, John A. Pennello and
John C. Truesdale, Individually and as Chairman and
Members of the NLRB, Norton J. Come, Dean H. Francis
and Betty J. Murphy, Individually,
Defendants-Appellees,
and
Lockheed Missiles & Space Company, Inc.,
Intervenor-Appellee.

[Filed July 15, 1982]

Opinion
Appeal from the United States District Court
for the Northern District of California

Honorable William W. Schwarzer, Presiding

Argued and submitted January 13, 1982

Before: Trask, Sneed and Tang, Circuit Judges

Trask, Circuit Judge:

Appellant International Association of Machinists and Aerospace Workers (hereinafter the International) brought

an action for declaratory and injunctive relief against appellee, the General Counsel of the National Labor Relations Board (NLRB), seeking review of his decision to withdraw a previously issued complaint and dismiss appellant's unfair labor practice charge. The district court dismissed the action for lack of subject matter jurisdiction.

In this appeal, the International challenges the general proposition that the General Counsel's discretionary decisions regarding the investigation of charges, and the issuance and prosecution of complaints is precluded from review under section 3(d) of the Labor Management Relations Act (LMRA), 29 U.S.C. § 153(d) (1976).[1] Contrary to the general rule, the International asserts that the General Counsel's decisions are presumptively reviewable. In the alternative, appellant contends that even if the General Counsel's decisions are as a rule unreviewable, this case fits within an exception to the rule because the General Counsel allegedly violated constitutional and statutory mandates. Finally, appellant argues that a distinction has been recognized, for purposes of judicial review, between the issuance of an unfair labor practice complaint and the decision to withdraw a complaint after it has been issued. Ap-

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[1]Section 3(d) provides, in pertinent part:

> The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than trial examiners and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law.

pellant urges that the general rule of non-reviewability does not apply to the withdrawal of complaints.

We affirm the district court's dismissal of the present action. Appellant's assault on the non-reviewability of the General Counsel's prosecutorial decisions is foreclosed by a clear line of contrary authority. Although there are exceptions to this rule, the facts of this case do not fit those exceptions because appellant has not shown that the General Counsel abused his discretionary authority or acted in violation of the labor laws. Concerning the purported distinction between the issuance and the withdrawal of an unfair labor practice complaint, we agree with the Fourth Circuit's decision in *George Banta Co. v. NLRB*, 626 F.2d 354 (4th Cir. 1980), which held that when no settlement of a complaint is at issue, the decision to withdraw the charge is non-reviewable.

I
FACTS

Many of the facts relating to this appeal are set forth in this court's opinion in *Benda v. Grand Lodge of the International Association of Machinists & Aerospace Workers*, 584 F.2d 308 (9th Cir. 1978). A restatement of the facts relevant to this appeal follows.

In the summer of 1977, contract negotiations were held between the International and Lockheed Missiles & Space Company, Inc. (LMSC), a wholly-owned subsidiary of Lockheed Aircraft Corporation. Although previous negotiations had been coordinated with the negotiations at other Lockheed subsidiaries, each company had voted separately on whether to accept or reject a new contract. The accep-

tance of a contract by employees of one subsidiary did not preclude its rejection by employees of another.

LMSC employees rejected the contract proposals from the 1977 summer negotiations and struck in October. When negotiations resumed in November, the International informed the district and local union representatives that it intended to engage in corporate-wide joint unified bargaining. The new bargaining plan required a majority vote of the combined membership employed at all Lockheed subsidiaries before any proposal could be accepted.

On November 22, three of the subsidiaries presented their final contract offers and the LMSC union representatives voted to present the LMSC proposal to its membership for a vote. Negotiators representing the unions at two other subsidiaries were not satisfied with proposals they received and voted not to present the contracts to their membership. Based on these developments, the International representatives ruled that all Lockheed companies would be informed that the contract proposals had been rejected. LMSC union representatives objected to this procedure and consulted their local delegate bodies who recommended that the contract be presented to the members.

On November 25, the International's president suspended the officers of District Lodge 508, the lodge which represented LMSC employees, and designated an officer of the International as Trustee to take charge of the affairs of the lodge. Two days later, LMSC employees voted to accept the contract. Despite this acceptance, the International attempted to continue the strike against LMSC.

In December 1977, the president of District Lodge 508 sued in district court challenging the trusteeship imposed by the International. The district court entered a preliminary injunction against the International. The injunction prohibited the International from maintaining a trusteeship over the lodge and from suspending officers and in any way interfering with those LMSC employees who desired to return to their jobs.

Also during this period the International filed an unfair labor practice charge against LMSC with the NLRB. The General Counsel issued a complaint citing LMSC's action in bypassing the International and dealing directly with District Lodge 508. The complaint alleged that LMSC violated its duty to bargain collectively with the union. The General Counsel, however, deferred any further action regarding the complaint pending appeal of the preliminary injunction.

This court affirmed the preliminary injunction against the International in *Benda v. Grand Lodge of the International Association of Machinists & Aerospace Workers*, 584 F.2d 308 (9th Cir. 1978). The court found, *inter alia*, that the twenty-year pattern of separate voting by the employees of each Lockheed subsidiary indicated that the suspended officers of Lodge 508 were properly carrying out their collective bargaining duties and that it was the International, rather than the officers of Lodge 508, that was interfering with the bargaining process. *Id.* at 317.

After the result in *Benda*, the complaint against LMSC was reviewed by the General Counsel and the decision was made to withdraw the unfair labor practice complaint and dismiss the charge. The order issued by the Acting Regional Director for Region 32 indicated this decision was

based on the conclusion that LMSC was justified in its refusal to bargain:

> [LMSC] had not unlawfully refused to bargain because it had at least a good faith belief that the International was engaging in bad faith bargaining in violation of Section 8(b)(3), *i.e.*, that the International was attempting to force the Employer to agree to "coordinated bargaining" among the separate units, a non-mandatory subject of bargaining.

The Regional Director denied the International's request to reissue the withdrawn complaint. The union brought an administrative appeal, but the General Counsel upheld the dismissal.

II

THE GENERAL COUNSEL'S PROSECUTORIAL DISCRETION

Appellant insists that the General Counsel's decision to withdraw and dismiss appellant's unfair labor practice charge is presumptively reviewable. In support of this argument appellant relies upon sections 702[2] and 704[3] of

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[2]Section 702 provides:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party.

[3]Section 704 provides in pertinent part:

> Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or

the Administrative Procedures Act (APA), 5 U.S.C. §§ 702, 704 (1976), which establish the general policy of the Act favoring review of administrative actions. Appellant raises several objections listed under the standards for judicial review of administrative actions set forth in section 706[4] of the Act. We find, however, that the General Counsel's decisions are not presumptively reviewable under the APA. Section 701(a) of the Act exempts actions of an administrative agency from review if "statutes preclude judicial review" or if the decisions are "committed to agency discretion by law." 5 U.S.C. § 701(a) (1976). The exemption provided in section 701 1538, 1622-23 (1948). Prior to the enactment of the Taft-Hartley Act of 1947, the Board acted

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intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

[4]Section 706 provides in part:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority or limitations, or short of statutory right. . . .

as prosecutor, judge and jury in unfair labor practice cases. This arrangement generated considerable criticism; therefore, section 3(d) was added to separate the prosecutorial and adjudicatory functions by transferring the Board's prosecutorial authority to the General Counsel. *See I.U.E. v. NLRB*, 289 F.2d 757, 761 (D.C. Cir. 1960). During the enactment of section 3(d), Senator Taft acknowledged that Congress was granting "vast and unreviewable" power to the General Counsel NLRB, *Legislative History, supra*, at 1623. The senator described the General Counsel's role as similar to "the Attorney General of the United States or a State Attorney General." *Id., cf. NLRB v. Sears*, 421 U.S. 132, 156 n.22 (1975) (the analogy to public prosecutor was criticized). We find that the legislative history does not support appellant's claim that the General Counsel's prosecutorial decisions are subject to direct review.

III

EXCEPTIONS TO THE RULE

The Court indicated in *Leedom v. Kyne*, 358 U.S. 184 (1958), that exceptions may exist to the general rule precluding review. The Court reviewed the record supporting a decision entered by the Board and determined that

> [t]his suit is not one to 'review' in the sense of that term as used in the Act, a decision of the Board made within its jurisdiction. Rather it is one to strike down an order of the Board made in excess of its delegated powers and contrary to a specific prohibition in the Act.

Id. at 188. Following the Supreme Court's example in *Leedom*, the Fifth Circuit added that a district court may review the Board's actions when 'hey violate constitutional

rights. *Bova v. Pipefitters & Plumbers Local 60*, 554 F.2d 226, 228-9 (5th Cir. 1977); *Balanyi v. IBEW*, 374 F.2d 723, 726 (7th Cir. 1967); *Boire v. Miami Herald Publishing Co.*, 343 F.2d 17, 21, (5th Cir. 1965). Additionally, this court had alluded to a potential third exception for agency actions "wholly without basis in law." *NLRB v. IBEW, Local 357*, 445 F.2d 1015, 1016 n.2 (9th Cir. 1971).

Appellant points to no express provision in the labor acts which the General Counsel's decision clearly violates. Thus, the first exception is inapplicable to this case. We also find appellant's argument that the General Counsel's actions violated its constitutional rights similarly unconvincing. And insofar as appellant argues that the General Counsel's action constitutes a departure from the Board's precedent in *United Steel Workers and Lynchburg Foundry*, 192 NLRB 773 (1971), appellant apparently invokes the third exception for actions "wholly without a basis in law." This exception also is inapplicable in this case because, contrary to appellant's assertions, the General Counsel's action did not violate the Board's past precedent in *Lynchburg*.

In its constitutional argument, appellant asserts that the charging party has a "private right" in the prosecution of its unfair labor practice complaint and should be afforded a hearing before a complaint is withdrawn. Although the Supreme Court recognizes "that the charging party may have vital 'private rights' in the Board proceeding," *International Union, Local 283 v. Scofield*, 382 U.S. 205, 220 (1965), there is no case holding this right to constitute a constitutional right for due process purposes. Moreover, in *Saez v. Goslee*, 463 F.2d 214 (1st Cir. 1972), the court opined that "it is doubtful that appellant has an

'entitlement' to have an unfair labor practice complaint issue in the same sense that, for example, a welfare recipient has a statutory entitlement to benefits." *Id.* at 215. Even assuming there is an entitlement, appellant fails to demonstrate that the existing procedures were not sufficient to protect its rights; appellant received a written explanation of the action taken by the General Counsel and was afforded an administrative appeal. The court in *Goslee,* examined the union's interest in the issuance of a charge and held that it did "not seem to be of a nature serious enough to warrant imposition of a hearing requirement." 463 F.2d at 215.

Turning to the purported third exception for actions "wholly without a basis in law," appellant assumes that the Board's decision in *United Steel Workers and Lynchburg Foundary,* 192 NLRB 773 (1971). Indicates a broad approval of all union attempts to establish pooled ratification. *Lynchburg,* however, dealt with the narrow question of whether such ratification is *per se* illegal. *Id.* at 776. The administrative law judge, whose decision the NLRB adopted, held only that pooled voting was not *per se* illegal and that the particular facts of the case did not suggest that the procedure was designed to effect a merger of separate bargaining units. 192 NLRB at 779. The facts indicated that the purpose of pooled ratification was to maintain common contract expiration dates, a legitimate goal of collective bargaining. *Id.* at 778.

In this case, the union never presented the NLRB with any legitimate objectives to be achieved by pooled ratification. Additionally, the General Counsel's withdrawal notice and dismissal order specifically relied upon evidence indicating that the union unlawfully sought to force a

merger of the separate Lockheed bargaining units. Thus, far from being wholly without basis in law, the General Counsel had sound legal grounds for his decision to withdraw and dismiss appellant's complaint.

Appellant argues, however, that once the complaint is issued a private right is created and the complaint cannot be withdrawn without a hearing. The union urges that a distinction has been recognized between the issuance and the withdrawal of a complaint, either for purposes of the due process right to a hearing or the reviewability of the General Counsel's prosecutorial decision. The authorities relied upon by appellant, however, uniformly refer to settlements of complaints rather than decisions by the General Counsel to withdraw and dismiss a complaint. For example, appellant relies upon *NLRB v. IBEW, Local 357*, 445 F.2d 1015 (9th Cir. 1971), in which this court reviewed a settlement of a complaint. The settlement was based on certain factual findings that were challenged by the charging parties. *Id.* at 1016. This court held that an evidentiary hearing on the disputed facts was required. Other circuits similarly have ordered evidentiary hearings to consider objections raised by charging parties concerning the settlement of their complaints. *See, e.g., Leeds & Northrup Co. v. NLRB*, 357 F.2d 527 (3d Cir. 1966).

The only court of appeals that has considered the reviewability of the General Counsel's decision to withdraw and dismiss a complaint, *George Banta Co., Inc. v. NLRB*, 626 F.2d 354 (4th Cir. 1980), distinguished the cases dealing with settlements. We agree that the settlement of a charging party's complaint is distinguishable from a prosecutorial decision to withdraw and dismiss a complaint. Whereas a settlement involves the restructuring of the charging

party's "private rights," a dismissal based on the decision that there is no merit to the charge is a different matter. In *George Banta*, the Fourth Circuit held that "the authority vested in the General Counsel over the prosecution of complaints 'must include the power to determine whether a complaint can be successfully prosecuted and, if he thinks not, to drop it.'" *Id.* at 356, *quoting Local 282, Teamsters v. NLRB*, 339 F.2d 795, 799 (2d Cir. 1964). As the court reasoned in *George Banta*,

> . . . jurisdiction to review General Counsel's prosecutorial decisions does not depend upon whether or not he has issued a complaint. It is the character of the decision which is critical. Where, as here, the decision is fundamentally prosecutorial—based essentially upon a determination that the available evidence will not support prosecution of the alleged violation—we hold that we lack jurisdiction to review.

626 F.2d at 356. The Fourth Circuit's analysis is applicable here because the decision not to prosecute the unfair labor practice complaint in this case was based upon the General Counsel's finding that the employer had a valid defense to the union's charge.

Our decision is in accordance with the language of section 3(d) because the statute provides that "final authority is vested in the General Counsel for both the issuance and the prosecution of complaints. For the reasons assigned, we hold that section 3(d) of the LMRA precludes review of a decision to withdraw a complaint when that decision is accompanied by a statement indicating the reasons for the action.

The judgment of the district court is AFFIRMED.

APPENDIX B

United States District Court
Northern District of California
No. C-79-3300-WWS
International Association of Machinists and Aerospace Workers, AFL-CIO,
Plaintiff,

vs.

William Lubbers, et al.,
Defendants.
and
Lockheed Missile and Space Company,
Intervenor.
[Filed June 13, 1980]

ORDER

Defendants move to dismiss the complaint for lack of subject matter jurisdiction. Rule 12(b)(1), Fed.R.Civ.P. They contend that this court lacks jurisdiction to review the decision of the General Counsel of the National Labor Relations Board ("NLRB") to withdraw an improvidently issued unfair labor practice complaint.

The decision whether to issue an unfair labor practice complaint in a particular case is committed to the General Counsel's discretion. 29 U.S.C. § 153(d); *Mayer v. Ordman*, 391 F.2d 889 (6th Cir.), *cert. denied*, 395 U.S. 925 (1968). That decision normally is not subject to judicial review. *Id.; Pacific Southwest Airlines v. NLRB*, 611 F.2d 1309 (9th Cir. 1980). Nor can district court jurisdiction be founded on either the general grant of jurisdiction pursuant to 28 U.S.C. § 1337 or the Administrative Procedure Act, 5 U.S.C. § 701, *et seq. Balanyi v. Local Brotherhood*

of Electrical Workers, AFL-CIO, 374 F.2d 723 (7th Cir. 1967); *Mayer v. Ordman, supra; Saez v. Goslee*, 343 F. Supp. 845 (D. Puerto Rico 1971) aff'd 463 F.2d 214 (1st Cir.), *cert. denied*, 409 U.S. 1024 (1972). These principles must necessarily apply with equal force where a complaint, initially improvidently issued, is withdrawn by the General Counsel. The facts alleged do not bring this case within the categories of cases in which District Court jurisdiction has been recognized to correct Board action which was contrary to specific prohibitions of the act and in excess of its power or which deprived a party of constitutional rights. *See, Bova v. Pipefitters and Plumbers Local 60 AFL-CIO*, 554 F.2d 226, 228 (5th Cir. 1977); *United Electrical Contractors Assoc. v. Ordman*, 258 F. Supp. 758, 762 (SD NY 1965), aff'd 366 F.2d 776 (2d Cir.), *cert. denied*, 385 U.S. 1026 (1966).

The action must therefore be dismissed for lack of jurisdiction.

IT IS SO ORDERED.

Dated: June 13, 1980

WILLIAM W. SCHWARZER
United States District Judge

Appendix C

Administrative Procedure Act, Title 5:

§ 701. Application; definitions.

(a) This chapter applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

§ 702. Right of review.

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, That any mandatory or injunctive decree shall specify the Federa officer or officers (by name or by title), and their successors in office, personally responsible or compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expresaly or impliedly forbids the relief which is sought.

§ 704. Actions reviewable.

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

Labor Management Relations Act, Title 29:

Section 153(d) [3(d)]—General Counsel

(d) There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than trial examiners and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law. In case of a vacancy in the office of the General Counsel the President is authorized to designate the officer or employee who shall act as General Counsel during such vacancy, but no person or persons

so designated shall so act (1) for more than forty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate, or (2) after the adjournment *sine die* of the session of the Senate in which such nomination was submitted.

Section 160(f) [10(f)]—Review of Final Order of Board.

(f) Any persons aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

Supreme Court, U.S.
FILED
JAN 18 1983
ALEXANDER L. STEVAS
CLERK

No. 82-741

In the Supreme Court of the United States

OCTOBER TERM, 1982

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, PETITIONER

v.

WILLIAM A. LUBBERS, ET AL., AND LOCKHEED MISSILES & SPACE COMPANY, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether a decision by the General Counsel of the National Labor Relations Board not to prosecute unfair labor practice charges filed by the petitioner was subject to judicial review in the district court.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-741

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, PETITIONER

v.

WILLIAM A. LUBBERS, ET AL., AND LOCKHEED MISSILES & SPACE COMPANY, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A12)[1] is reported at 681 F.2d 598. The order of the district court (Pet. App. A13-A14) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 13, 1982. On October 1, 1982, Justice Rehnquist extended the time within which to file a petition for certiorari to and

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[1]The reprinting of the court of appeals' opinion in the appendix to the certiorari petition omits page 6 of the slip opinion, which should have come after the phrase "in Section 701" on line 12 of Pet. App. A7. That page is reproduced as a Supplemental Appendix to this Brief, *infra*.

including October 29, 1982, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act (29 U.S.C. 151 *et seq.*) ("the Act") and the Administrative Procedure Act (5 U.S.C. 701 *et seq.*) are set forth at Pet. App. A15-A17.

STATEMENT

1. In the summer of 1977, collective bargaining negotiations were commenced between petitioner Union and Lockheed Missiles & Space Company ("LMSC"), a wholly-owned subsidiary of Lockheed Aircraft Corporation. Although past practice had been to coordinate these negotiations with negotiations at other wholly-owned subsidiaries of Lockheed, the employees of each subsidiary had always voted separately to accept or reject a contract. Acceptance of a contract by the employees of one subsidiary did not preclude its rejection by employees of another. (Pet. App. A3-A4).

In October 1977, following the rejection of a contract proposal by the LMSC employees, those employees went on strike. When negotiations resumed the next month, petitioner informed the local employee representatives that thenceforth petitioner would conduct negotiations on a joint, unified basis, and that no proposal could be accepted absent a majority vote of the combined membership employed at all Lockheed subsidiaries (Pet. App. A4).

On November 22, three of the subsidiaries presented their final contract offers. The representatives of the LMSC employees voted to present the LMSC proposal to their membership, but the representatives of the employees at the other subsidiaries decided not to present the proposals to their members. Consequently, petitioner ruled that *all* the

proposals had been rejected. The LMSC representatives disagreed, and the officers of petitioner's District Lodge 508, which represented the LMSC employees, decided to present the proposal to its members. On November 25, petitioner suspended the officers of District Lodge 508 and placed the Lodge in trusteeship. Two days later, the LMSC employees voted to accept the contract proposal. (Pet. App. A4.)

Petitioner nevertheless attempted to continue the strike against LMSC. On December 6, 1977, the president of District Lodge 508 filed a suit in federal district court seeking an injunction to prohibit petitioner from maintaining the trusteeship and from interfering with LMSC employees who sought to return to their jobs. The district court granted the requested injunction on December 15, 1977. (Pet. App. A4-A5.)

The day before the district court suit was filed, petitioner filed charges in the Regional Office of the National Labor Relations Board alleging that LMSC had violated Section 8(a)(5) and (1) of the Act (29 U.S.C. 158(a)(5) and (1)) by bypassing petitioner and dealing directly with District Lodge 508. The Regional Director, on behalf of the Board's General Counsel, issued a complaint based on this charge. Subsequently, however, processing of the complaint was deferred pending appeal of the preliminary injunction (Pet. App. A5).

The court of appeals affirmed the preliminary injunction, finding that the twenty-year history of separate voting by the employees of each subsidiary indicated that the officers of District Lodge 508 were properly carrying out their collective bargaining duties and that it was petitioner, not the lodge officers, that was interfering with the bargaining process (Pet. App. A5). See *Benda* v. *Grand Lodge of the International Association of Machinists*, 584 F.2d 308 (9th

Cir. 1978). The Regional Director then reviewed the case and determined that the unfair labor practice complaint should be withdrawn and the charge should be dismissed, because the investigation revealed that LMSC "had not unlawfully refused to bargain because it had at least a good faith belief that [petitioner] was engaging in bad faith bargaining in violation of Section 8(b)(3) [29 U.S.C. 158(b)(3)], *i.e.*, that [petitioner] was attempting to force [LMSC] to agree to 'coordinated bargaining' among the separate units, a non-mandatory subject of bargaining" (Pet. App. A5-A6). The Regional Director denied petitioner's request to reissue the withdrawn complaint, and the General Counsel, on petitioner's administrative appeal, upheld the Regional Director's action (Pet. App. A6).

2. Petitioner then filed the instant action in the United States District Court for the Northern District of California challenging the General Counsel's decision to withdraw the complaint. The district court held that the General Counsel's decision to withdraw an improvidently issued unfair labor practice complaint is not subject to judicial review and therefore granted the Board's motion to dismiss for lack of subject matter jurisdiction (Pet. App. A13-A14).

The court of appeals affirmed, observing that petitioner's attempt to secure review of the General Counsel's decision "is foreclosed by a clear line of contrary authority" (Pet. App. A3). The court reasoned that the decisions of the General Counsel to withdraw unfair labor practice complaints are not presumptively reviewable under the Administrative Procedure Act, because Section 3(d) of the National Labor Relations Act (29 U.S.C. 153(d)), its accompanying legislative history, and relevant judicial opinions (including *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 138-139, 155 (1975)), establish that such decisions are exempt from judicial review under 5 U.S.C. 701(a).

The latter provision makes review unavailable if "statutes preclude judicial review" or if the decisions are "committed to agency discretion by law" (Pet. App. A7-A8; Supp. App., *infra*, 1a). The court thus agreed that "the General Counsel's prosecutorial decisions are not subject to review by the Board or by a court" (Supp. App., *infra*, 2a).

Nor, the court held, did this case fall within any exception to this rule of nonreviewability. The court noted that the General Counsel's decision here did not constitute an action "contrary to a specific prohibition in the Act" (Pet. App. A8-A9, quoting *Leedom* v. *Kyne*, 358 U.S. 184, 188 (1958)) and did not violate petitioner's constitutional rights (Pet. App. A9-A10). Moreover, with respect to petitioner's "purported third exception for actions 'wholly without a basis in law,' " the court noted that the Board decision cited by petitioner, *United Steel Workers (Lynchburg Foundary Co.)*, 192 N.L.R.B. 773 (1971), was distinguishable. Indeed, the court held that, in view of evidence indicating that petitioner sought to force a merger of separate bargaining units, the General Counsel's decision, far from being "wholly without basis in law," was based on "sound legal grounds" (*id.* at A10-A11).

Finally, the court rejected petitioner's attempt to distinguish the reviewability of the General Counsel's decision not to issue a complaint in the first instance from the reviewability of a decision to withdraw a previously issued complaint. In so ruling, the court expressed its agreement with the Fourth Circuit's decision in *George Banta Co.* v. *NLRB*, 626 F.2d 354 (1980), cert. denied, 449 U.S. 1080 (1981), "which held that when no settlement of a complaint is at issue, the decision to withdraw the charge is nonreviewable" (Pet. App. A3, A11-A12).

ARGUMENT

1. In *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 155 (1975), this Court held that a decision by the General Counsel not to issue an unfair labor practice complaint represents "an *unreviewable* rejection of the charge filed by the private party" (emphasis added). Accord: *Vaca* v. *Sipes*, 386 U.S. 171, 182 (1967); *Detroit Edison Co.* v. *NLRB*, 440 U.S. 301, 316 (1979). In *Sears*, the Court noted that in Section 3(d) of the Act (29 U.S.C. 153(d)), Congress delegated to the General Counsel "the unreviewable authority to determine whether a complaint shall be filed" (421 U.S. at 138), and explained (*id.* at 139):

> The practical effect of this administrative scheme is that a party believing himself the victim of an unfair labor practice can obtain neither adjudication nor remedy under the labor statute without first persuading the Office of General Counsel that his claim is sufficiently meritorious to warrant Board consideration.[2]

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[2]Consequently, petitioner's assertion (Pet. 13-16) that the fact that private rights are vindicated in Board proceedings and that private parties do have certain rights when complaints are actually adjudicated (*International Union, UAW* v. *Scofield*, 382 U.S. 205, 220 (1965)), does not establish that a private party may require the General Counsel to pursue the adjudication of a particular unfair labor practice charge. See *Saez* v. *Goslee*, 463 F.2d 214, 215 (1st Cir. 1972); Pet. App. A9-A10.

Equally without merit is petitioner's argument (Pet. 12) that the legislative history of Section 3(d) of the Act shows that Congress intended that decisions not to issue complaints were to be reviewable. This argument is based on Senator Taft's remark that, "So far as having unfettered discretion is concerned, [the General Counsel], of course, must respect the rules of decision of the Board and of the courts" (NLRB, *Legislative History of the Labor Management Relations Act, 1947*, 1623). In that same statement Senator Taft remarked that this provision simply "transfer[red] this 'vast and unreviewable power' [to decline to issue complaints] from this anonymous little group [the

This rule of nonreviewability has been consistently applied in every circuit.[3]

Thus, it is well settled that the General Counsel's decision not to issue a complaint is not, as petitioner contends (Pet. 8-11), presumptively reviewable under the Administrative Procedure Act, but rather falls within the exception in 5 U.S.C. 701(a) for situations in which review is precluded by statute or the action in question is committed to agency discretion. See pages 4-5, *supra*.[4]

Board's legal assistants] to a statutory officer [the General Counsel] responsible to the President and to the Congress" (*ibid.*). Moreover, Senator Taft further stated that, in exercising his prosecutorial discretion, the General Counsel's function "is like that of the attorney general of the United States or a State Attorney General" (*ibid.*)

The expectation reflected in the excerpts from Senator Taft's statement quoted by petitioner that the General Counsel will be guided by Board and judicial precedent in exercising his discretion whether to issue an unfair labor practice complaint thus does not suggest that the exercise of that discretion is subject to judicial review. The Attorney General, too, presumably is to be guided by precedent in deciding whether to prefer charges, but this does not mean that his decision declining to initiate a prosecution in a particular case is thereby subject to judicial review. See *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 619 (1973).

[3]See *Lincourt* v. *NLRB*, 170 F.2d 306, 307 (1st Cir. 1948); *National Maritime Union* v. *NLRB*, 423 F.2d 625, 626-627 (2d Cir. 1970); *Newspaper Guild, Local 187* v. *NLRB*, 489 F.2d 416, 426 (3d Cir. 1973); *Associated Builders* v. *Irving*, 610 F.2d 1221, 1226 (4th Cir. 1979); *Hernandez* v. *NLRB*, 505 F.2d 119, 120 (5th Cir. 1974); *Mayer* v. *Ordman*, 391 F.2d 889, 890 (6th Cir. 1968); *Rockford Redi-Mix Co.* v. *Zipp*, 632 F.2d 30, 32-33 (7th Cir. 1980); *Royal Typewriter Co.* v. *NLRB*, 533 F.2d 1030, 1040 (8th Cir. 1976); *General Drivers, Local 886* v. *NLRB*, 179 F.2d 492 (10th Cir. 1950); *Bandlow* v. *Rothman*, 278 F.2d 866 (D.C. Cir.), cert. denied, 364 U.S. 909 (1960).

[4]In passing the APA Congress recognized that the Board's determination whether to issue a complaint was a matter committed to the agency's discretion and not subject to judicial review under Section 10 of the APA. See *Legislative History of the Administrative Procedure Act*, S. Doc. No. 248, 79th Cong., 2d Sess. 229-230 (1946).

2. Nor does the fact that here the General Counsel issued, but then withdrew, the complaint alter the outcome. Contrary to petitioner's contention (Pet. 16-18), this case is significantly different from *Leeds & Northrup Co.* v. *NLRB*, 357 F.2d 527, 533 (3d Cir. 1966). There the court concluded that when the General Counsel seeks to *settle* a complaint proceeding, the charging party is "entitled to a hearing on its objections to [such an] informal settlement or compromise, entered into between the Regional Director and the charged party," because such a settlement *constitutes an adjudication* of the dispute which is subject to judicial review. Here, as in *George Banta Co.* v. *NLRB*, 626 F.2d 354, 357 (4th Cir.), cert. denied, 449 U.S. 1080 (1980),, where the Fourth Circuit dismissed an attempt by a charging party to secure review in the court of appeals under Section 10(f) of the Act, 29 U.S.C. 160(f), of the General Counsel's decision to withdraw (*not* settle) part of a complaint, the General Counsel's action was, in contrast to *Leeds & Northrup*, a "recognition that a cause of action could not be proved. As such, it was an unreviewable prosecutorial decision" (626 F.2d at 357).

Petitioner's effort (Pet. 19) to distinguish *George Banta* on the ground that there the General Counsel chose to withdraw the complaint "based essentially upon a determination that the available evidence will not support prosecution of the alleged violation" (626 F.2d at 356-357), while here the General Counsel "made no *evidentiary* finding that [petitioner's] charge could not be sustained" (Pet. 19; emphasis in original), is without merit. In the first place, the General Counsel did withdraw the complaint based on an assessment of the evidence: he determined that the facts

here would not support the position that LMSC had committed the alleged violation (see page 4, *supra*).[5]

Moreover, as this Court held in *Leedom* v. *Kyne*, 358 U.S. 184, 188 (1958), a Board action not reviewable through the normal appellate route is reviewable in district court only if "made in excess of its delegated powers *and contrary to a specific prohibition in the Act*" (emphasis supplied), not where the Board decision in question is one "within its jurisdiction" (*ibid.*). Petitioner does not contend that the General Counsel acted beyond his jurisdiction and contrary to a specific prohibition in the Act, but only that he acted in

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[5]Accordingly, as the court of appeals noted (Pet. App. A10-A11), petitioner's contention (Pet. 7, 21, 25-28) that the General Counsel's withdrawal of the complaint was contrary to the Board's decision in *United Steelworkers (Lynchburg Foundry Co.)*, 192 N.L.R.B. 773 (1971), is unfounded. In *Lynchburg Foundry*, employees at separate plants owned by the same employer were represented by two independent locals of the same international union. Traditionally, the locals bargained for separate contracts, but the expiration dates of the contracts always coincided. In the contract negotiations preceding the filing of the unfair labor practice charge, the employer made a proposal, which if accepted by one unit but not the other "would result in obliterating the common expiration dates then contained in the two contracts." 192 N.L.R.B. at 776. This, the locals believed, would weaken the union's bargaining strength at both plants. *Ibid.* To make sure that the contract continued to have common expiration dates, the locals decided to submit the employer's proposal to one pooled ratification vote. *Ibid.* The issue in *Lynchburg Foundry* was whether this voting procedure was unlawful. The Board found that there was no evidence establishing that an object or effect of the locals' voting "procedure was to require the Company to bargain with [them] in a single combined bargaining unit composed of the employees from both plants." *Id.* at 779. Rather, the object of the pooled voting procedure was the lawful insistence upon maintaining common contract expiration dates. *Id.* at 778. Here, in contrast, the General Counsel found that LMSC reasonably could believe that petitioner's object was unlawfully to force the employer to bargain as if petitioner represented a "single combined bargaining unit."

conflict with Board decisional authority.[6] And, as we have shown (see note 5, *supra*), even that contention is erroneous, for the General Counsel's position here does not in fact conflict with Board authority.

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[6] *Southern California District Council of Laborers, Local 1184* v. *Ordman*, 318 F. Supp. 633, 636 (C.D. Cal. 1970), relied upon by petitioner (Pet. 7), is inapposite. There the district court, disagreeing with the General Counsel, held as a matter of law that the limitations provision of the Labor Act, 29 U.S.C. 160(b), did not bar the filing of an unfair labor practice complaint. Accordingly, the district court ordered the General Counsel to consider the merits of the charge. The district court stated, however: "If, after considering the merits of plaintiffs' charges, [the General Counsel] concludes that no complaint should issue, no judicial review of [that] determination may be had." *Id.* at 636. Moreover, the Ninth Circuit, "[w]ithout deciding the validity of the *Local 1184* holding," has limited it to cases involving a "purely legal question." *Bays* v. *Miller*, 524 F.2d 631, 634 (1975). The instant case, in contrast to *Local 1184*, required the General Counsel to engage in "a complex weighing of facts to resolve" (524 F.2d at 634) the issue of whether LMSC had a "good faith belief" that petitioner was acting improperly in attempting to impose coordinated bargaining among separate bargaining units (Pet. App. A6).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1983

DOJ-1983-01

of the APA applies in this case because section 3(d) of the Labor Management Relations Act (LMRA), 29 U.S.C. § 153(d) (1976), vests in the General Counsel exclusive prosecutorial authority over unfair labor practices. The statute provides that the General Counsel "shall have *final authority* on behalf of the Board, *in respect of* the investigation of charges and *issuance of complaints* under [the labor acts], *and in respect of the prosecution of such complaints before the Board* . . . ." *Id.* (emphasis added). Although the Supreme Court has not ruled on the reviewability of a decision by the General Counsel to withdraw and dismiss a complaint, section 3(d) of the LMRA has been construed to preclude review of the General Counsel's initial charging decisions. *E.g., NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 155 (1975); *Pacific Southwest Airlines* v. *NLRB*, 611 F.2d 1309, 1311 (9th Cir. 1980). The Court stated in *Sears*:

> . . . Congress has delegated to the Office of General Counsel 'on behalf of the Board' the unreviewable authority to determine whether a complaint shall be filed. 29 U.S.C. § 153(d); *Vaca* v. *Sipes*, 386 U.S. 171, 182 (1967). In those cases in which he decides that a complaint shall issue, the General Counsel becomes an advocate before the Board in support of the complaint. In those cases in which he decides not to issue a complaint, no proceeding before the Board occurs at all. The practical effect of this administrative scheme is that a party believing himself the victim of an unfair labor practice can obtain neither adjudication nor remedy under the labor statute without first persuading the Office of General Counsel that his claim is sufficiently meritorious to warrant Board consideration.

421 U.S. at 138-139.

The legislative history of section 3(d) confirms that the General Counsel's prosecutorial decisions are not subject to review by the Board or by a court. See NLRB, *Legislative History of the Labor Management Relations Act, 1947*, 541, 882,